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**Supreme Court of the United States**

OCTOBER TERM, 1991

TEMPLE OF THE LOST SHEEP INC., a/k/a Action Committee to  
Help the Homeless Now and HENRY JEROME MACKEY, a/k/a  
Jerome Mackey,

*Petitioners,*

—v.—

ROBERT ABRAMS, Attorney General of the State of New York,  
NEW YORK NEWS, INC., JACK NEWFIELD, JOHN DAVIS, and  
THOMAS WHELAN, and JILL LAURIE GOODMAN,

*Respondents,*

ON PETITION FOR CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

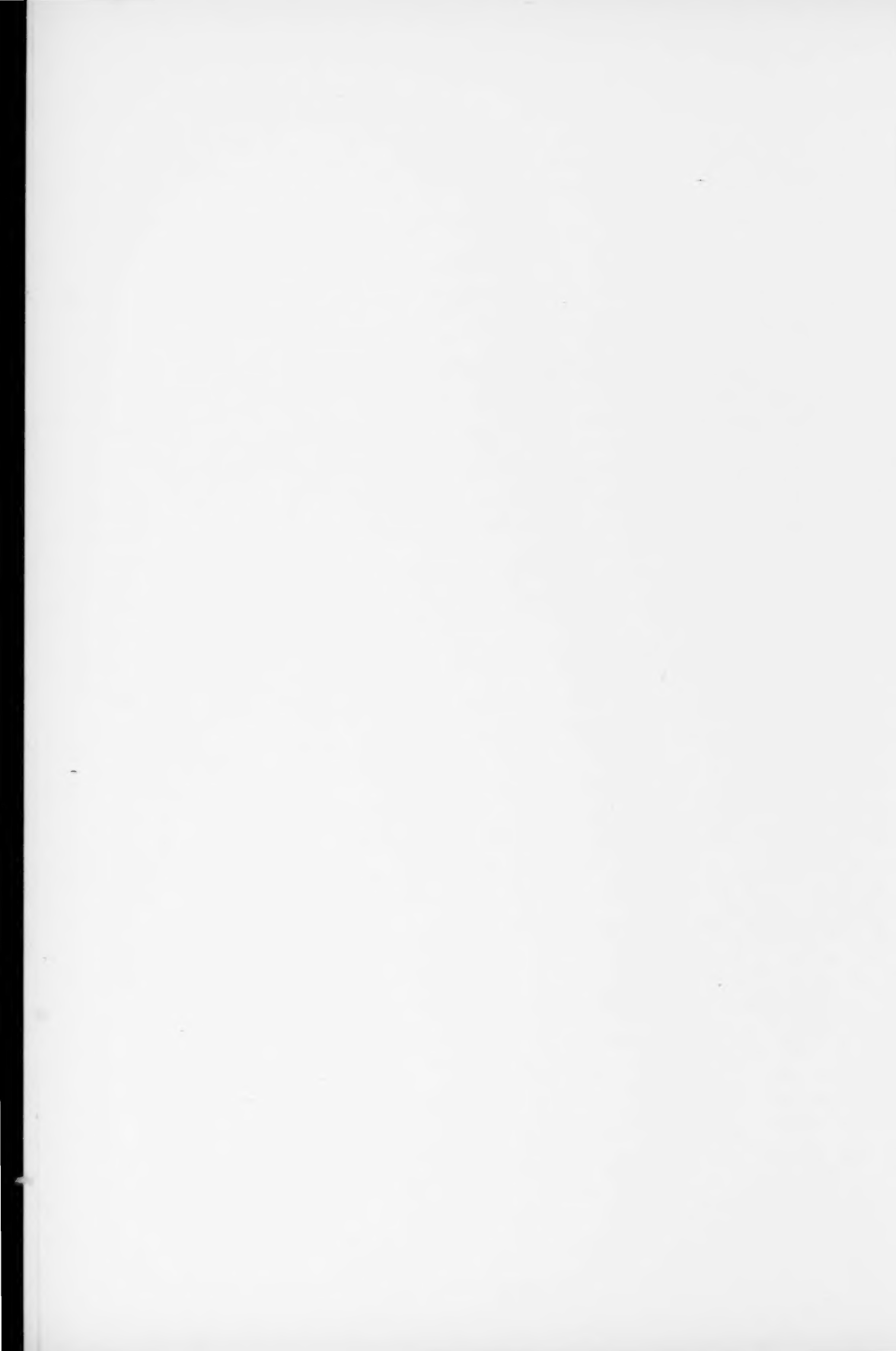
**PETITION FOR CERTIORARI**

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## QUESTIONS PRESENTED

1. May a federal plaintiff preserve his federal claims under the "England" doctrine in a case in which "Younger" abstention has been applied?
2. Does the Due Process Clause permit a federal plaintiff to be compelled to litigate federal claims not at issue in State Court, in a state forum, in which the state is a defendant ?
3. Does the Due Process clause permit the District Court to collaterally estop a federal plaintiff from litigating federal claims that he chose not to litigate in a demonstrably biased state forum ?



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## OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Second Circuit, which is reported as *Temple of the Lost Sheep, a/k/a Action Committee to Help the Homeless Now, and Henry Jerome Mackey v. Robert Abrams, Attorney General of the State of New York, New York News, Inc., Jack Newfield, John Davis, Thomas Whelan and Jill Laurie Goodman* 930 F.2d 178 (2d Cir. 1991) (per Feinberg, W., Timbers, W., and Miner, R.), and reprinted in the Appendix to the Petition for Certiorari, infra. at App.1, 261.

## JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit from which review is sought was entered on April 5, 1991. That decision affirmed the judgment of the United States District Court for the Eastern District of New York, dismissing petitioners' complaint. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

### AMENDMENT V

No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . . .

## STATEMENT OF THE CASE

This case involves the plight of a church to secure a hearing in federal court to redress constitutional deprivations alleged to have been brought on by a conspiracy between a state and a newspaper.

Petitioners hold it to be unconscionable that a federal plaintiff, alleging § 1983 violations, could have been compelled to adjudicate his claims in a State Court Special Proceeding in which there was no oral argument, discovery, fact

finding, or trial, and where petitioners' § 1983 complaint alleged bias against the specific forum into which a federal judge compelled petitioners to be thrust.

The District Court dismissed the petitioners' claims arising under 42 U.S.C. § 1983 because a subsequent State Court proceeding had resolved against petitioners issues central to those claims, and alternatively, as against the state defendants, those claims were barred by qualified immunity. The District Court also found that petitioners' claims arising under 42 U.S.C. Section 1985(3) failed to state a claim under Fed. R. Civ. P. 12(b)(6). The Court then dismissed the remaining state-law claims for lack of subject matter jurisdiction.

At issue in this petition is not the facts the respondents purport to have established, but the process - including the choice of tribunal in which petitioners' federal claims are alleged to have been adjudicated - by which the respondents, and in particular the State, obtained the result it sought. To set in context the violations of fairness and religious freedom claimed by petitioners, requires only the following exposition of the record.

#### **A. HOW THE STATE ATTORNEY GENERAL WAS ABLE TO CIRCUMVENT PETITIONERS' DISTRICT COURT ACTION**

In the fall of 1988, the Temple of the Lost Sheep Inc., a/k/a the Action Committee to Help the Homeless Now, (the Church) expelled respondents John Davis and Thomas Whelan from the organization for breaking Church rules (i.e. drinking, taking drugs, and stealing). When they left, they professed their intention to get revenge against the petitioners. They contacted respondent Jack Newfield, a writer for the New York Daily News (the News). Therefrom, a conspiracy with the New York State Attorney General (the "State" or the "A.G.") was conceived in which the end result would be to assert State control over the homeless shelter run by the Church, spin off the religious element therefrom, and to assert charges against petitioner Henry Jerome Mackey (Mackey) personally. To achieve this result, the News and State, in tandem, would issue a series of derogatory news articles about the petitioners, and issue subpoenas to the Church and

its members, in an attempt to give credence to the articles and create a public outcry against the petitioners. It was hoped that these actions would scatter the Church's membership, induce additional dissatisfied members to testify against the Church's controlling hierarchy, and produce actual complainants from members of the public who had financially supported the Church over the years. At that time, the State actually had not one single public complainant against the Church, nor has it produced a single bona fide complainant, since.

Shortly thereafter, Mackey received a telephone call from an ex-Church member who claimed he had been questioned by the State, and sought to divulge details and information about the State investigation in return for a fee. Mackey rejected the offer as an extortion attempt. Thereafter, the News contacted Mackey, misrepresenting their true intentions, and requesting pictures and information about the finances of the shelter. Because of their misrepresentation, Mackey cooperated with the News by answering directly questions put to him about the finances of the Church, and posing for and supplying the pictures requested. Thereafter, the first of a series of derogatory articles was published by the News, and the State served subpoenas upon the Church, Mackey, and other members of the Church. In 1980, 1983, and 1985, the State had previously sought to subpoena Church members and documents without justification, and without complainants. In each instance, petitioners informed the State of its abuse of authority.

On December 22, 1988, petitioners commenced this lawsuit in the Eastern District of New York, by way of Order to Show Cause, alleging various violations of their constitutional rights under U.S.C. § 1983 and a conspiracy to violate their rights under § 1985(3). (App.1, 227) The petitioners requested a declaratory judgment on the extent of the State's ability to subpoena a Church's books and records and members without some showing of wrongdoing on the part of the Church or its members; petitioners challenged State authority to grant the A.G. such a power or the A.G.'s usurpation of such power. Secondly, petitioners requested a preliminary injunction against the News, enjoining them from continuing to write clearly untrue statements about the petitioners, and to

publish retractions of the untruths already published, and enjoining the State from issuing subpoenas to the Church and its members without some showing of wrongdoing on the part of the petitioners. Finally, petitioners sought compensatory and punitive damages for the alleged constitutional deprivations.

Without responding timely to petitioners' Order to Show Cause, the State started a subsequent "Special Proceeding" in New York State Supreme Court to compel compliance with subpoenas. The State then served the State Court papers on the petitioners and Judge Raggi, only minutes before the oral arguments in the District Court. The State, based upon the just served papers, then requested that the District Court abstain from hearing petitioners' claims. On at least three previous occasions, the State had sought to subpoena petitioners' books and records, and its members, and such request had been rebutted by the petitioners. In theory, those subpoenas had not been complied with. In this instance, however, the State sought judicial relief after only three weeks because the State could see the seriousness of the Federal Court litigation.

At the oral argument, the State requested that the District Court abstain from hearing petitioners' claims based upon the just commenced State action. Petitioners' original complaint alleged that the State Courts represented a demonstrably biased forum in its prior decisions relating to the petitioners.<sup>1</sup>

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<sup>1</sup> 12/20/77 A.G. sought and received money judgment against Mackey from New York Supreme Court Justice Martin B. Stecher, without a trial, and based upon 15 counts in which Mackey had been adjudged innocent in a federal trial.

1/9/80, New York Supreme Court Justice Bernard Nadel granted an order of contempt against Mackey for non payment of the 12/20/77 judgment, upon recommendation of special referee Florence Belsky Esq., even though an "automatic stay" was in effect resulting from Mackey's bankruptcy petition, and the State had been notified of the stay on 4/9/79.

With full knowledge that a federal bankruptcy stay was in effect, on 1/28/80 the State opposed Mackey's appeal of money judgment to Appellate Division: First Department, and the Appellate Division upheld said Order of Contempt.

State declined to oppose discharge of the debt in Bankruptcy Court, but 6 months after the debt had been discharged in bankruptcy, on 6/19/81, the State moved to incarcerate Mackey for contempt.

The State repeatedly subpoenaed books and records of the Church on its own volition, without a single bona fide complainant. (App. 1, 233)



In response to Judge Raggi's inquiry, the State reluctantly admitted that it had no complainants from the public at large, nor did the State possess a single sworn statement alleging misconduct by petitioners (App.1, 148, line 22). Nonetheless, Judge Raggi denied petitioners' request for preliminary injunction and indicated her inclination to abstain from hearing the case based on *Younger v. Harris*, 401 U.S. 37 (1971). Because the State had surprised petitioners with the subsequent State action, petitioners informed Judge Raggi of their intention to amend their complaint.

The Petitioners were required by the New York State Civil Practice Law and Rules (CPLR) to respond to the State's petition. On the return date for the State's motion to compel compliance with the subpoenas, the petitioners submitted papers requesting the New York State Supreme Court to Quash the Subpoenas, Stay, or Dismiss the Petition because of the instant federal court litigation (App. 1, 87). Petitioners also attached a copy of their federal complaint to show the existence of their federal claims then pending before the District Court. Since it was the State's petition and they had not requested oral argument, the petitioners were not entitled to oral argument on the motion to compel compliance with subpoenas. The petitioners intentionally avoided raising their federal conspiracy claims in the State Court so as to reserve them for determination in the District Court under the doctrine of *England v. Louisiana State Board of Medical Examiners* 375 U.S. 411.

Because of Judge Raggi's inclination to abstain from hearing the case, and the State's subsequent action, the petitioners were willing to accept state adjudication of the narrow issue of "compliance with the subpoenas". Petitioners, thereafter, amended their complaint in the District Court and dropped their request for a declaratory judgment, so that the petitioners would no longer be seeking equitable relief, in the expectation that abstention would not then be appropriate under *Younger*.

In June 1989, Judge Raggi nonetheless granted respondents' motion and stayed this action pending the conclusion of the subsequent State Court proceeding. Thereafter, the petitioners moved for Judge Raggi's recusal on the ground that

she was biased.<sup>2</sup> Judge Raggi denied petitioners' motion for recusal and petitioners appealed from that order and also sought a Writ of Mandamus to compel Judge Raggi to recuse herself. The Second Circuit Court of Appeals dismissed the appeal and denied petitioners' petition for a mandamus.

Petitioners, thereafter, moved in State Court by order to show cause, to prevent Justice Greenfield from making any decision concerning petitioners' federal claim of conspiracy. Said order to show cause was denied.<sup>3</sup> Petitioners then moved in the New York State Supreme Court Appellate Division: First Department (Appellate Division) for a review of Judge Greenfield's ambivalent position. The Appellate Division requested that petitioners withdraw their request for appellate review without prejudice on the ground that the issue was premature. Petitioners accordingly complied with the request of the Appellate Division.

## **B. HOW RESPONDENTS OBTAINED THE COLLATERAL ESTOPPEL EFFECTS OF THE STATE COURT PROCEEDING**

In January 1990, Justice Greenfield ruled on the motions before him, granting the A.G.'s motion to compel compliance with the subpoenas and denying the petitioners' cross-motions. Petitioners filed a timely notice of appeal with the

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2 Prior to her appointment as a Federal judge, 95% of the trial experience of Judge Raggi, had been in the capacity of a prosecutor which gave rise to a question concerning her interest in the outcome of the case.

Immediately prior to the commencement of this case, the District Court Judge had spent seven of the previous ten years employed as an Assistant U.S. Attorney or the U.S. Attorney, and was married to an executive assistant U.S. Attorney employed by the Southern District of New York. Appellants' Complaint sought to hold state prosecutors personally liable for their misconduct. Should a District Court jury have found the defendants personally liable after a trial, that decision could have had an adverse effect on the District Court Judge herself, and her husband, placing them both at risk. That risk was known by the judge from the beginning of the case and constituted "an interest that could be substantially affected by the outcome of the proceeding." Thus Judge Raggi was required, but failed to disqualify herself at the outcome of the case pursuant to 28 U.S.C. § 455(a)&(b). Nor did she inform petitioners of her interest in the outcome of the case.

In *U.S. v. Pepper and Potter Inc.*, D.C. N.Y. (1988) 677 F. Supp. 123, 125, the District Court Judge concluded that his limited earlier involvement when he was United States Attorney required his disqualification under § 455 (a) because there could be an appearance of partiality.

3 The reasons set forth by Justice Greenfield for his failure to sign petitioners' Order to Show Cause dated 6/29/89 were: "1. Atty. Gen. not notified 2. Ct. will not be barred from considering whatever is appropriate for decision". (App.1, 216)

Appellate Division. Petitioners thereafter returned to the Eastern District Court and moved to vacate Judge Raggi's order staying the federal proceedings. Judge Spatt, to whom the case had been reassigned, found that the state court action had been concluded but would not allow petitioners to proceed with the case until the uncertainty of the petitioners' state court notice of appeal had been resolved. A two week adjournment was thereby granted for petitioners to withdraw their state court notice of appeal. Since it was petitioners' position that the state court decision in no way limited their conspiracy claims in the federal court proceeding, the petitioners withdrew their notice of appeal, and fully complied with the subpoenas. Upon returning to the District Court, Judge Spatt granted petitioners' motion to vacate Judge Raggi's previous order. Subsequently, the respondents moved to dismiss the federal complaint. In September, 1990, Judge Spatt granted respondents' motion on the ground that the petitioners were collaterally estopped from pursuing their claims arising under 42 U.S.C. § 1983 because of Judge Greenfield's decision, and alternatively as against the State, those claims were barred by qualified immunity; petitioners' claim arising under 42 U.S.C. § 1985(3) failed to state a claim and there was lack of subject matter jurisdiction for petitioners' remaining state law claims.

#### C. HOW THE COURT OF APPEALS AFFIRMED THE DISMISSAL

The Court of Appeals recognized that the petitioners had raised troubling issues regarding the combined use of *Younger* abstention and the doctrine of "Collateral Estoppel". It nonetheless rejected all of the petitioners' principle claims. The Court of Appeals determined that the *England* doctrine can only be applied in *Pullman* type abstention cases. As to the Collateral Estoppel effect of Judge Greenfield's Order, the Court of Appeals concluded that petitioners placed the conspiracy allegations directly at issue in the State Court proceedings and had the opportunity to litigate those claims in State Court. Finally, the Court of Appeals held that they did not need to reach the alternate ground of qualified immunity, and summarily agreed that the petitioners failed to state a 1985(3) claim.

## SUMMARY OF ARGUMENT

Certiorari should be granted because, in at least three related respects, courts below violated not only Fifth Amendment principles, but also elementary notions of fairness in the rules of law;

First, Judge Raggi made the improper conclusion that the allegedly conclusive conduct engaged in by the private defendants with the A.G. was at issue in the State Court Special Proceeding to compel compliance with subpoenas.

Second, Judge Greenfield, when approached to determine the existence or non existence of petitioners' federal conspiracy claims in the State Court proceeding, declined to be definitive.

Third, contrary to the most basic principles of due process forbidding collateral estoppel effect unless issues are clearly determined, Judge Spatt and the Court of Appeals improperly concluded that Justice Greenfield had resolved petitioners' federal conspiracy claims against petitioners, although no such mention was expressed in Judge Greenfield's order.

## REASONS FOR GRANTING THE PETITION

### I. A FEDERAL PLAINTIFF MAY PRESERVE HIS FEDERAL CLAIMS UNDER THE *ENGLAND* DOCTRINE WHEN A DISTRICT COURT ABSTAINS UNDER *YOUNGER*

The Court of Appeals erroneously concluded that there are fundamental differences between *Railroad Commission v. Pullman Co.* 312 U.S. 496 (1941) abstention and *Younger* abstention, sufficient enough to negate the application of preservation of rights under *England* in all *Younger* abstention cases. The petitioners disagree.

This Court, in *England*, ruled that federal plaintiffs could have reserved their federal claims, and thereby avoid preclusion by informing the State Court that they intended to return to Federal Court to pursue their federal claims should the State Court rule against them on the question of state law. In that case the court abstained under the doctrine of *Pullman*.

The case at bar is similar to *Pullman* and almost identical to *England*. Petitioners believe that they were entitled, under *England*, to preserve their federal conspiracy claims and did in fact take the necessary steps to preserve those claims. Here, the petitioners had original federal court jurisdiction, had not previously litigated any of their claims in state court, and were required to submit their state claims to adjudication in the subsequent state proceeding. Petitioners objected to being forced to adjudicate their federal and state law claims relative to the subpoenas in the subsequent State Court Special Proceeding, as indicated in the initial oral argument before Judge Raggi. <sup>4</sup> Judge Raggi made no indication at either oral argument that she was attempting to force petitioners to litigate their conspiracy claim in State Court as well. Had she done so, petitioners would have protested in a like manner.

The Court of Appeals, in reaching its conclusion that the petitioners could not reserve their federal claims in District Court, relied on the pre-supposition that petitioners' § 1983 conspiracy claim was before Justice Greenfield. How could that issue get before Justice Greenfield? Certainly the State did not put it at issue by the filing of its initial petition. Thus, the issue could only be placed there by petitioners' responsive motion papers, dated December 19, 1988, or Judge Raggi's Memorandum and Order, dated June 7, 1989. (App. 1, 106). The Court of Appeals assert that petitioners sought to preserve all of their federal claims. The petitioners did not make such

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4 "THE COURT : So it's clear to me that no proceedings of substance have yet occurred in this court. On the other hand, the state has now gone into the State Court and sought to have the injunction enforced, or to have the subpoena enforced. You'll have an opportunity to raise all of your objections to that subpoena before a State Court judge.

There's no reason to think a State Court judge won't honor the First Amendment, as well as I. Is there?

MR. ROBERSON : Yes, there is, ma'am, the reason so as indicated in our papers, the whole basis of this complaint has been repeated common plan and scheme over a period of time.

THE COURT : Are you saying that the New York State courts are participants in this scheme as well as the Attorney General?

MR. ROBERSON : What we're saying specifically is that the Attorney General has been able to, however it may be, be able to go beyond federal laws, and which is clearly indicated by what happened in the federal bankruptcy case. You had a federal bankruptcy stay which was violated."

(App. 1, 141)

a claim. Rather, petitioners only claim to have preserved their § 1983 conspiracy claim. Petitioners are not arguing that the State Court does not have the authority to resolve federal constitutional questions, but rather that it can only determine those issues that are properly before it. The District Court case involved two basic issues: 1. The conspiracy between the respondents, and 2. The question of the A.G.'s statutory authority to issue the subpoenas. The Special Proceeding in State Court specifically dealt with the latter. Therefore, *Younger* abstention correctly granted the State Court the ability to resolve all federal constitutional questions directly pertaining to the A.G.'s statutory authority to issue the subpoenas. Justice Greenfield did that in his order. Petitioners are not claiming that they preserved their federal claims relative to the subpoenas. However, petitioners do aver that they preserved their federal conspiracy claims, an issue that was not before the State Court.

The petitioners' federal § 1983 conspiracy claim was not raised in State Court by the pleadings of the petitioners. Petitioners were required by the CPLR to respond to the A.G.'s petition, and were required by *Government Employees v. Windsor*, 353 U.S. 364, to inform the State Court what their federal claims were, so that the state claims could be construed "in light of" the federal claims. In filing their State Court cross-motions, petitioners intentionally avoided placing the issue of conspiracy before the State Court for adjudication so as to preserve that issue in the District Court under *England*. Subsequent to the filing of their state court cross-motions, petitioners submitted a copy of their federal pleadings, with all exhibits and affidavits, to Judge Greenfield to enable him to see the full scope of petitioners' federal claims. Petitioners' disclosures pursuant to *Windsor* were made solely and exclusively for the purpose of informing the State Court of the full extent of its then pending federal conspiracy claims.

Judge Raggi's Order erroneously concluded that the issue of conspiracy was also in the State Court for adjudication, along with the validity of the subpoenas. The petitioners challenge Judge Raggi's ability to place their § 1983 conspiracy claim in issue in the State Court Special Proceeding, as more fully outlined below. When Judge Raggi made that



ruling, petitioners immediately moved in State Court to challenge Justice Greenfield's subject matter jurisdiction over their federal conspiracy claims. These acts by the petitioner, when combined, preserved their federal § 1983 conspiracy claims. Judge Greenfield did adjudicate petitioners' constitutional claims relative to the validity of the subpoenas, but declined to rule on the issue of conspiracy.

Judge Raggi's Order was, in certain respects, an abstention under *Pullman*. While it is true that the subsequent Special Proceeding in State Court involved important state interests that might have provided petitioners with an adequate opportunity for judicial review, it is equally true that the petitioners' Federal Court action challenged the A.G.'s ability to issue subpoenas in this instance and challenged the statutory authority (the New York State statute) which empowered the A.G. to do so. The State Court Special Proceeding, as defined in *Pullman*, therefore involved an inquiry focused on the possibility that the State Court might interpret the challenge to the statutory authority so as to eliminate, or at least alter materially, the constitutional question presented. Judge Raggi's Order clearly noted this point when it stated: "The Court will not address defendants' remaining challenges to plaintiffs' claims until the state proceeding concludes, since the decision in that case may very well modify, if not dispose of, certain of the claims raised here." ( App. 1, 127) Judge Raggi's Order contemplated petitioners' return to federal court to litigate their conspiracy claims against the Daily News defendants. Thus it is clear that Judge Raggi did not contemplate the outright dismissal of the federal suit and the presentation of all claims both state and federal before the state court, rather she merely postponed the federal jurisdiction, as is the case in *Pullman* abstentions.

The rationale for allowing reservation of a federal claim in a state court proceeding following a *Pullman* abstention is applicable to the case at bar. Whether Judge Raggi had abstained under *Pullman* or *Younger* would in no way have affected the subsequent state court proceeding. The respondents made a motion for Judge Raggi to abstain and she granted their motion. It was the respondents that made the request for *Younger* abstention. It is inconceivable that a

federal plaintiff can reserve his rights under *England* if the court abstains under *Pullman*, but can't reserve his federal rights if the court abstains under *Younger*, and that the label for such determination can be set forth by the hands of the respondents. There is currently no label for an abstention containing both *Younger* and *Pullman* type characteristics.

The right of a federal plaintiff to choose a federal forum where there is a choice, cannot be denied. Nothing in *Younger* abstention requires or supports such a result. Abstention, whether *Pullman* or *Younger*, "is a judge-fashioned vehicle for according appropriate deference to the respective competence of the state and federal court systems."

## II. THE DUE PROCESS CLAUSE DOES NOT PERMIT A FEDERAL PLAINTIFF TO BE COMPELLED TO LITIGATE HIS FEDERAL § 1983 CLAIMS, NOT AT ISSUE IN STATE COURT, IN A BIASED STATE FORUM, IN WHICH THE STATE IS A DEFENDANT.

The existence or non-existence of a conspiracy between the respondents was a factual determination which could only have been established at a trial. Petitioners' § 1983 claim could not have been accidentally placed at issue in the state court merely by the petitioners' informing the State Court of their pending District Court litigation. Assuming, *arguendo*, that petitioners' § 1983 claim had inadvertently been placed in the State Court by the petitioners, Justice Greenfield could not have made the factual determination of the existence of the alleged conspiracy without joining the News as a party to the State Court proceeding, as required by CPLR 1001(b), and conducting a trial on the issue as required by CPLR section 410

Judge Raggi, in her Memorandum and Order dated June 7, 1989, attempted to compel petitioners to adjudicate their federal § 1983 claims in the State Court Special Proceeding, by stating that the issues were there when in fact they clearly were not. As noted above, petitioners were compelled under *Windsor* to disclose the existence of its Federal Court action against the A.G. and others for conspiracy. The fact that petitioners disclosed to the State Court its pending District



Court litigation, was interpreted by Judge Raggi to be the equivalent of raising the conspiracy issue for litigation in the state forum. Petitioners disagree.

An issue arises as to whether the petitioners would have been able to expand the scope of the State Court Special Proceeding to litigate their federal conspiracy claims. The State Court Special Proceeding was limited to one issue: whether or not the State could compel the Church to comply with State issued subpoenas. Furthermore, at no time did any party to the State Court Special Proceeding attempt to join another party as a third-party defendant, a necessary element before the issue of conspiracy could have been adjudicated in that forum.

The question then becomes whether it would have been in the petitioners' interest to expand the scope of the Special Proceeding to litigate their conspiracy issues in the state court. In order to do so, petitioners would have had to have clearly given up their right to litigate their federal conspiracy claim in federal court and litigate the same in a forum they knew to be biased; something it was not in the interest of petitioners to do. Further, petitioners would have had to assume an inferior position, accept a limited ability to discover, become a defendant as opposed to a plaintiff, and be unable to recover damages in an amount determined by a jury.

Petitioners charged the A.G. with conspiracy to deprive constitutionally protected freedoms. The A.G. has repeatedly been able to achieve same in the state forum, only because he received cooperation from New York State judges. New York judgeships are politically sponsored, elected, and appointed, and the office of the New York State Attorney General is a political office. That coincidence creates a climate of collusion, and at a trial, New York State judges would have had very little incentive to allow the exposition of the very nepotismic relationships upon which the livelihood of their associates depended. While it was not petitioners' intention to show disrespect to New York State judges, in the past, some have clearly chosen to close their eyes to the law in order to grant the constitutionally violative motions set before them by the A.G.. Petitioners' amended complaint sets forth ample evidence that the A.G. is capable of performing every illegal

act he is supposed to protect the public against, and has repeatedly demonstrated his ability to deprive petitioners of freedoms secured by the constitution, with the full cooperation of numerous different State Court judges.

As evidence to this point, if the A.G. were honest and confident of his position, he would have been more than willing to have a fair trial in federal court. The reason he so desperately opposed the district court's hearing of this case, goes far beyond simply doing his job. At the heart of the issue was the A.G.'s fear that, in federal court, he would lose and be exposed for his heinous crimes whereas in state court, because of his political clout, and petitioners' limited ability to discover, he was almost assured of winning.

The District Court was under an unflagging obligation to view the petitioners' complaint in the light most favorable to the petitioners. However, when confronted with the A.G.'s subsequent State Court Proceeding and a request to abstain, Judge Raggi clearly abdicated her obligation and viewed the evidence in the light most favorable to the respondents.

Abstention is the exception and not the rule, is justified only in limited circumstances, and is generally not favored in § 1983 actions because it would frustrate the purpose of § 1983 actions.<sup>5</sup> In the case at bar, the District Court's abstention frustrated petitioners' § 1983 action. The Court of Appeals, in the face of noted case law to the contrary, ruled that the petitioners were collaterally estopped with respect to their § 1983 claims which could have been, but were not, raised in the State Court Special Proceeding.

Judge Greenfield specifically rejected the notion that conspiracy had been properly placed before him and further outlined the constitutional claims that petitioners had raised

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<sup>5</sup> *Bailey v Patterson* (1962) 369 US 31, 7 L Ed 512, 82 S Ct 549; *Zwickler v Koota* (1967) 389 US 241, 19 L Ed 2d 444, 88 S Ct 391. *Brown v Bronstein* (1975, SDNY) 389 F Supp 1328. *Donohoe Constr. Co v Maryland-National Capital Park & Planning Com.* (1975, DC Md) 389 F Supp 21. *5th Circuit-Moreno v Henckel* (1970, CA5 Tex) 431 F2d 1299, 2 BNA FEP Cas 1009. *Douglas Research & Chemical Inc. v Solomon* (1975, ED Mich) 388 F Supp 433, *Stradley v Andersen* (1972, CA 8 Neb) 456, F2nd 1063.)

in state court.<sup>6</sup> Judge Greenfield's Decision and Order further set forth the context in which the petitioners' federal pleadings were received.<sup>7</sup>

The Court of Appeals, citing *Steffel* 415 U.S. at 460-61, stated that "a pending state proceeding, in all but unusual cases, would provide a federal plaintiff with the necessary vehicle for vindicating his constitutional rights. . ." What would cause a case to be unusual? The fact that the petitioners brought a § 1983 action? The fact that the State was a defendant with a well documented history of bias against petitioners? The fact that petitioners alleged from the beginning that they could not get a fair trial in state court?

The Court of Appeals punished the petitioners for their failure to litigate their § 1983 action in the context of the Special Proceeding. The issue remains whether the petitioners could have been compelled, against their will, to litigate their federal § 1983 claims in a biased forum, or lose the right to do so. An affirmative answer to this issue, seems unconscionable. This Court, in *England*, held that there are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a State Court's determination of those claims. This Court further held that a federal plaintiff may not be unwillingly deprived of the primary fact determination that would have been by the District Court.

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6 "She [Judge Raggi] further found that the State Court could properly address the Constitutional claims of respondents [petitioners] with respect to privacy, free association, freedom of religion and the right against self incrimination." (App.1, 132)

7 "In opposition to the motion of the Attorney General and in support of the cross-motion by Mackey and the Temple, respondents [petitioners] submit the complaint and amended complaint in the Federal action together with a short affirmation of counsel for the Temple. In addition, respondents [petitioners] submit two affidavits of present members of the Temple who not only attack the character of the two former members of the Temple who have occasioned the Attorney General's investigation, but also detail certain conversations with those two former members to support respondents' [petitioners'] allegations of a conspiracy between the Attorney General and the Daily News to either shut down the shelter, or in the alternative, to take over the shelter from Mackey and operate it as a city-run facility." (App.1, 133 last paragraph)

### **III. THE DUE PROCESS CLAUSE DOES NOT PERMIT A DISTRICT COURT TO COLLATERALLY ESTOP A FEDERAL PLAINTIFF WHO CHOOSES NOT TO LITIGATE HIS § 1983 FEDERAL CLAIMS IN A DEMONSTRABLY BIASED STATE FORUM.**

This Court held in *Montana v. U.S.* 99 S.Ct 970 (1979), that the following three part test is to be applied to cases involving the application of the doctrine of "collateral estoppel" : (1) the issues must be identical, (2) there must be a full and fair opportunity to litigate the claims, (3) there is no equitable reason why collateral estoppel should not be applied.

The respondents take the position that Justice Greenfield's determination that the subpoenas were statutorily valid, and that the A.G. was not acting in "bad faith" relative thereto, is equivalent to a ruling that there was no conspiracy between the respondents. Let us analyze this logic and uncover the erroneous underpinnings. Would the converse of that logic still hold true ?

If Justice Greenfield had ruled that the A.G. either lacked authority to issue the subpoenas, or was acting in bad faith, would the News be collaterally estopped from denying that there was a conspiracy between the respondents ? Such a conclusion could not in all fairness be made against the News since they were not a party to the State Court Special Proceeding and had no ability to contravert any factual determination that took place there. Therefore, it is clear that for there to have been a factual determination of the existence of a conspiracy, the News would have had to have been joined as a party to the proceeding. The fact that Justice Greenfield did not join the News as a party, did not have a trial on the issue of conspiracy, and did not explicitly discuss conspiracy in his order, can only lead one to conclude that he did not render a determination about the factual existence of a conspiracy between the respondents. It is equally clear that the A.G. could have had the statutory authority to issue subpoenas to the Church, and still have participated in a § 1983 conspiracy to deprive petitioners' constitutional rights.

The issues to be decided in the District Court were not identical to the issues decided in State Court.

"For a question to have been actually litigated, so as to

satisfy the identicality requirement under *Schwartz v Public Adm'r. of County of Bronx*, (24 N.Y. 2d 65, 71, 298 NY Sup. 2d. 955, 246 NE 2d, 725) it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding. Petitioners' § 1983 and § 1985(3) conspiracy claims were not raised in state court. Accordingly, petitioners' federal § 1985(3) and § 1983 conspiracy claims to be decided by the District Court are not identical to the issues that were decided by Justice Greenfield since the petitioners' federal conspiracy claims were not raised in State Court by the parties in their pleadings, nor were they otherwise placed in issue and actually determined by Justice Greenfield.

The District Court and the Court of Appeals, read into Judge Greenfield's opinion, something that did not exist by concluding that he must have first determined the issue of conspiracy adversely to petitioners in order to compel compliance with the subpoenas. Such a determination is pure speculation. To be sure, Judge Greenfield explicitly avoided ruling on or discussing conspiracy. Due process requires that ambiguous readings be determined in the light most favorable to petitioners. In that respect, petitioners were denied due process.

Judge Greenfield's order did not address and did not need to address petitioners' § 1983 claim in order to resolve the issues that had been presented to him. Justice Greenfield clearly indicated that point when he stated :

“ . . . it is not necessary for this court to discuss and determine the overlapping of the two actions and whether the resolution of the Federal action will be dispositive of this proceeding to compel compliance with the subpoena. . . . ”  
(App.1, 137 first paragraph)

The character and effect of a conspiracy are to be judged, not by dismembering it and viewing its separate parts, but only by looking at it as a whole, and, in regarding the conspiracy in this manner, if acts which are lawful in essence are bound together as parts of a single plan, the plan may make the parts unlawful. <sup>8</sup> Therefore, the character and effect of the con-

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<sup>8</sup> *Montague & Co v Lowry* (1904) 193 US 38, 48 L Ed 608, 24 S Ct 307; *United States v Patten* (1913) 226 US 525, 57 L Ed. 333, 33 S Ct 141; *Swift & Co v United States* (1905) 196 US 375, 49 L Ed 518, 25 S Ct 276; *United States v Reading Co.* (1912) 226 US 324, 57 L Ed 243, 33 S Ct 90 mod on other grounds 228 US 158, 57 L Ed 779, 33 S Ct 509; *Bedford Cut Stone Co v Journeymen Stone Cutters' Asso.* (1927)

spiracy to deprive plaintiffs' constitutional rights alleged in the case at bar, are to be judged, not by dismembering it and viewing the separate acts of the A.G. and the News, but only by looking at them as a whole. Whether the individual acts of the defendants are illegal or actionable, is of no consequence, if the requisite elements are present to spell out a 42 USC § 1983 action. The main focus in a common law conspiracy action is on the *mens rea* element. In a § 1983 action, however, the statute requires the plaintiffs to show damages caused by the conspiracy.

The respondents committed acts in furtherance of the conspiracy more than just the issuance of the subpoenas. To the extent petitioners are able to show that the respondents conspired with an invidious-discriminatory intent, for the purpose of depriving petitioners of equal protection of the law or equal privileges and immunities under the law, that one of the respondents committed an act in furtherance of the conspiracy, and that petitioners were deprived of their rights as a result of that conspiracy, the independent categorization or classification of the acts of the respondents is irrelevant. The conspiracy alleged by petitioners included a common plan and scheme which included numerous illegal acts by the A.G. and other co-conspirators spanning a period of 20 years. For the District Court and the Court of Appeals to rule that the single act of issuing the subpoenas, assuming its legality, precluded the possible illegality of any of the other acts alleged, without discovery or trial, violated due process. No determination was ever made concerning the other illegal acts complained of by the petitioners.

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274 US 37, 71 L Ed 916, 47 S Ct 522, 54 ARL 791 (superseded by statute as stated in *Jacksonville Bulk Terminals, Inc., v International Longshoremen's Asso.* 457 US 702, 73 L Ed. 2d 327, 102 S Ct 2673, 110 BNA LRRM 2665, 94 CCHLC §13582); *American Tobacco Co v United States* (1946) 328 US 781, 90 L Ed 1575, 66 S Ct 1125; *Maryland & Virginia Milk Producers Asso. v United States* (1960) 362 US 458, 4 L Ed 2d 880, 80 S Ct 847; *United States v General Motors Corp* (1966) 384 US 127, 16 L Ed 2d 415, 86 S Ct 1321, 1966 CCH Trade Cases §71750, 10 FR Serv 2d 1245; *Monarch Tobacco Works v American Tobacco Co.* (1908, CC Ky) 165 F 774; *Louisiana Farmers' Protective Union, Inc. v Great Atlantic & Pacific Tea Co.* (1942, CA8 Ark) 131 F 2s 419; *United States v New York Great Atlantic & Pacific Tea Co* (1943, CA5 Tex) 137 F 2d 459, cert den 320 US 783, 88 L Ed 471, 64 S Ct 191; *United States v Bausch & Lomb Optical Co.* (1943, DC NY) 3 FRD 331. 61 USPQ 86; *United States v General Dyestuff Corp.* (1944, DC NY) 57 F Supp 642; *First Delaware Valley Citizens Television Inc. v CBS Inc.* (1975, ED Pa) 398 F Supp 925, 1975.



Based on the Court of Appeals' definition of conspiracy, a conspirator would not be guilty unless an illegal act was in fact committed. Under that theory, a defendant would never be guilty of conspiracy even if he wanted to and attempted to commit a crime, but was unsuccessful. We know that this is not the case.

For sure it can be said that the petitioners did not have a full and fair opportunity to litigate their federal § 1983 and § 1985 claims in the State Court Special Proceeding. As noted above, the petitioners demonstrated the existence of a biased state forum, in addition to the fact that the scope of the Special Proceeding was limited.

Article 4, Section 410 of the CPLR dealing with Special Proceedings provides that

"if triable issues of fact are raised, they shall be tried forthwith and the Court shall make a final determination thereon. If issues are triable of right by a jury, the Court shall give the parties an opportunity to demand a jury trial of such issues . . . ."

Article 41 Section 4101 of the CPLR provides that

"in the following actions, the issues of facts shall be tried by a jury unless a jury trial is waived

. . . (3) any other action in which a party is entitled by the Constitution or by express provision of law to a trial by jury."

Petitioners were entitled to a jury trial on their federal Conspiracy claims because it had been so requested in the District Court.

If Justice Greenfield had believed that the issue of conspiracy was before him, he was obligated under CPLR Article 4 Section 410 to inform petitioners of their right to demand a jury trial. Since Justice Greenfield did not inform petitioners that there would be a trial on the issue of conspiracy, it is clear that that issue was not before the court.

At every stage of the proceedings, petitioners were summarily barred from all forms of fact finding either by law or judicial determination. Pursuant to CPLR 3214(b), no fact

finding, discovery, oral argument, or trial was ever had in the State Court Special Proceeding. In fact, Judge Greenfield clearly set forth certain limitations that he perceived to exist.<sup>9</sup> Thus it can be said that petitioners did not receive a full opportunity to litigate their federal conspiracy claims.

For equitable reasons, the petitioners should not have been collaterally estopped from litigating their § 1983 and § 1985 federal claims in the District Court.

Res Judicata does not apply to suits under 42 USC § 1983 with respect to claims that could have been but were not raised in a prior state suit. *Williams v Sclafani* (1977, SD NY) 444 F.Supp. 895. While 42 USC § 1983 does not permit a plaintiff to relitigate constitutional claims actually determined in a prior state court proceeding, the prior state court proceeding does not bar federal court consideration of constitutional claims which were not actually litigated or determined in that proceeding. *Camarano v N.Y.* (1984, SD NY) 577 F.Supp. 18.

A judgment in a State Court proceeding which is simply an appeal from an administrative determination, limited under state law to determination of whether the administrative decision was supported by competent, substantial evidence on record taken as whole, does not preclude the subsequent 42 USC § 1983 Federal Court claim arising from the same set of facts. *Huron Valley Hospital Inc. v Pontiac* (1985, ED Mich.) 612 F.Supp. 654. The prior State Court affirmance of a State Administrative ruling does not preclude raising, in the subsequent Federal Civil Rights action, issues which were not and could not be raised in the state litigation. *Casines v Murchek* (1985, C.A. 11 Fla.) 766 F.2d. 1494.

A finding by a state court judge at a preliminary hearing that probable cause existed to proceed on a disorderly conduct charge against plaintiff in a later civil-rights action under 42 USC § 1983 was not the same issue as whether the police officer could have reasonably believed that the plaintiff was

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9 "It is not the function of the court at this stage to weigh the credibility of the complaint made by the former members of the Temple as against the affidavits of the two present members of the Temple which question their character and motives." *Abrams v Temple of the Lost Sheep Inc.* (App.1, 135, 2nd paragraph)



committing disorderly conduct and the the arrest was therefore in bad faith, and since the disorderly conduct charge was never prosecuted, plaintiff in later civil-rights action was not allowed to present evidence for cross examination of witnesses at probable cause hearing and did not have full and fair opportunity to litigate probable cause issue, so that the constitutional claims relating thereto were not barred by collateral estoppel. *Bailey v Andrews* (1987 C.A. 7 Indiana) 811 F 2d. 366.

It is an established rule that the judgment in a prior action does not operate as an estoppel to a second action as to matters not litigated in the former action, where the second action is upon a different claim, demand, or cause of action. *Re Nicholas's Estate*, 144 W. Va. 116, 107 S.E. 2d. 53, 82 ALR 2d 868. Such is the case at Bar. The state court proceedings were special in nature and the sole purpose was to give judicial approval to said subpoenas. This rule is particularly applicable where the issue involved in the later action was not subject to litigation in the prior action.<sup>10</sup> As noted above, the issues of conspiracy and equal protection were never addressed in the Special Proceedings.

Collateral estoppel is not applicable where the nature of the prior action is restricted or the matter was not within the issues as they were made or tendered by the pleadings in the prior action, or the non-existence then of the matter involved<sup>11</sup> As in the case at Bar, the mere fact that evidence was introduced with respect to a matter which was not at issue, does not preclude the assertion of such matter in a subsequent action. *Laconia National Bank v Lavallee*, 96 N.H. 353, 77A 2d 107. As noted above, the state court proceedings were limited in

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10 *Burnett v. King* 33 Cal. 2d 805, 205 P 2d 657, 12 ALR 2d 333; *Nash v. Gardner*, 232 S.C. 215, 101 S.E. 2d 283; *Davis v. First National Bank*, 139 Tex. 36, 161 S.W. 2d 467, 144 ALR 1; *Piro v. Piro* (Tex. Civ. App) 349 S.W. 2d 626; *Hagen V. Hagen*, 205 Va. 791, 139 S.E. 2d 821, 23 ALR 3d 619.

11 *Ash Sheet Co. V. United States* 252 U.S. 159 64 L. Ed. 507, 40 S.Ct. 241; *Wagner v. Baren* (Fla) 64 S. 2d 267, 37 ALR 2d 831; *East Mill Creek Water Co. v. Salt Lake City*, 108 Utah 315, 159 P 2d 863; *Angel v Bullington*, 330 U.S. 183, 91 L.Ed. 832, 67 S.Ct. 657; *Durham v Crawford*, 196 Ga. 381, 26 S.E. 2d. 778; *Bristow v Lang*, 221 Iowa 904, 266 N.W. 808; *Powell v Bailey*, (Ky) 376 S.W. 2d 532; *Canon v. Canon*, 223 N.C. 664, 28 S.E. 2d 240; *Kemp v. Miller*, 166 Va. 661, 186 S.E. 99; *Lorillard v Clyde*, 122 N.Y. 41, 25 N.E. 292; *Tax Lein Co. v Schultze*, 213 N.Y. 9, 106 N.E. 751 rehearing denied 213 N.Y. 700, 108 N.E. 1109.

scope, did not involve any discovery, and never addressed the issues of conspiracy or equal protection.

The District Court and the Court of Appeals erred in ruling that petitioners are collaterally estopped from litigating their federal conspiracy claims because they could have been raised in the prior State Court Special Proceeding. To hold that petitioners are now collaterally estopped from proceeding in federal court punishes petitioners for seeking to pursue their statutory right to federal court jurisdiction. Furthermore, petitioners would have been unfairly punished by being forced into a posture of defendants as opposed to plaintiffs, and severely limiting their scope of discovery and ability to recover damages.

### CONCLUSION

When the Second Circuit decision is considered in light of the history, policy, and law which have been documented in the foregoing pages, it seem clear that the court misconstrued the context in which this case should have been viewed. As a consequence, the court greviously misread the applicable law, violating petitioners' rights to due process and equal protection.

To permit such extrordinary results without plenary review by this Court would be troublesome, even if it could safely be predicted that what befell these petitioners would not befall others. Clarification of rights between church, state, and freedom of the press is badly needed.

For these and all the foregoing reasons, petitioners accordingly pray that a Writ of Certiorari issue so that such review may take place.

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